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May 8, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Reply Comments in the Matter of Application of Sections 251(b)(4) and 224(f)(1) of the Communicants Act of 1934, as amended, to Central Office Facilities of Incumbent Local Exchange Carriers, CC Docket No. 01-77

Dear Ms. Salas:

In reply to the comments filed on April 23, 2001, OnFiber Communications, Inc. ("OnFiber") hereby submits this letter to address issues raised by the incumbent local exchange carriers ("ILECs") on the ability of competitive fiber providers to access their central offices.

The record in this proceeding clearly supports granting the Petition for Declaratory Ruling submitted by the Coalition of Competitive Fiber Providers ("Coalition") to the Federal Communications Commission (the "Commission") requesting that Sections 251(b)(4) and 224(f)(1) of the Act apply to the ducts, conduit and rights-of-way (collectively, "pathways") at the ILEC central office buildings ("COs").[1] Numerous Commentors agreed with OnFiber that the Commission should grant the Petition because the CLECs' lack of stand-alone access[2] to pathways into and through ILEC central offices violates the clear language and contradicts the

[1] *Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as amended, to Central Office Facilities of Incumbent Local Exchange Carriers*, Petition for Declaratory Ruling filed by the Coalition of Competitive Fiber providers, CC Docket No. 01-77 (Mar. 15, 2001)("Coalition Petition").

[2] By "stand-alone" access to ILEC pathways into their central offices, OnFiber refers to access granted under agreements separate from formal Interconnection Agreements under the Act. A key component of the Petition – and OnFiber's support for it – rests on the proposition that the Act does not permit ILECs to force other carriers to interconnect with them solely for the purpose of gaining access to pathways into and through their central offices. Coalition Petition at 4-5; OnFiber Comments at 3. Where, as with OnFiber, carriers wish to obtain access to ILEC central offices because they are efficient points to deliver traffic to their carrier-customers, the Act does not contemplate, nor should the Commission tolerate, ILEC demands for interconnection when a carrier is not interested in undertaking it with the ILEC itself.

essential objectives of the 1996 Act by hindering competitive entry into local telecommunications markets.[3]

Consistent with the comments of most Commentors,[4] including Qwest,[5] OnFiber also noted that "the ILECs deny competitors access to its central office ducts, conduits and rights-of-way."[6] Where competitors want to access CLECs at the ILEC central office, it is standard business practice for the ILECs to require competitors to "construct new facilities outside the CO to reach a 'meet point' to connect", which "greatly increases the expense and time required to gain access to competitive fiber transport."[7]

Nevertheless, several of the ILECs insist that competitive fiber providers today have sufficient means for providing facilities to CLECs inside ILEC central offices.[8] As explained in the attached Declaration, "with the exception of Verizon in the Bell Atlantic legacy region, the incumbents *do not* afford fiber providers stand-alone entry into their central offices necessary to provide efficient competitive transport services."[9] Having a tariff offering in portions of a handful of states cannot satisfy the needs of a competitive nationwide marketplace.

Despite ILECs' unsubstantiated claims to the contrary, competitive fiber carriers do not have available the uniform means necessary for accessing other competitive carriers whose equipment is located in COs. Without issuance of the declaratory ruling the Coalition seeks, ILECs will continue to be able to deny access to CO pathways to which the Act entitles them. Even within the Bell Atlantic legacy portion of Verizon's region, Verizon considers its offer of access to CO pathways to be entirely voluntary and one which it can withdraw at any time. Interestingly, while Qwest acknowledges the importance of requiring the ILECs to provide access to the ducts, conduits and rights-of-way associated with the central office, the Qwest ILEC admittedly refuses to voluntarily make such access available to its fiber competitors.[10]

The ILECs' continued refusal to acknowledge their statutory obligation to provide nondiscriminatory access to the ducts, conduits and rights-of-way to and through their central offices justifies and requires that the Commission grant the requested declaratory ruling on an expedited basis. Thus, OnFiber again urges the Commission to adopt the proposed requirements that the Coalition of Competitive Fiber Providers requested in its Petition for Declaratory Ruling.

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[3] OnFiber Comments at 6-10; ASCENT Comments at 2-3; AT&T Comments at 3-4; Comptel Comments at 5; WorldCom Comments at 2-4; *see also* Coalition Petition at 4-5.

[4] ASCENT Comments at 3; AT&T Comments at 3; Comptel Comments at 5; WorldCom Comments at 2.

[5] Qwest Comments at iii, 12-13.

[6] OnFiber Comments at 3 *citing* Coalition Petition at 4-5.

[7] Qwest at 13.

[8] VZ Comments at 3; SBC Comments at 12; *see also* Declaration at ¶¶ 4-5.

[9] Declaration at ¶ 6.

[10] Qwest Comments at 13, n. 36.

Respectfully submitted,

ONFIBER COMMUNICATIONS, INC.

By: _____

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of: Application of Sections 251(b)(4) and 224(f)(1) of the Communications Act of 1934, as amended, to Central Office Facilities of Incumbent Local Exchange Carriers	CC Docket No. 01-77

DECLARATION OF GLENN STOVER ON BEHALF OF ONFIBER COMMUNICATIONS INC.

BACKGROUND

1. My name is Glenn Stover and I am the Vice President of Government Affairs at OnFiber Communications, Inc. ("OnFiber"). My business address is 10201 Bubb Road, Cupertino, California 95014. I am responsible for state and federal regulatory and public policy issues. Specifically, I oversee OnFiber's relationships with the federal and state governments in jurisdictions where it operates or plans to operate. My 18 years of experience in the telecommunications industry includes 17 years as Senior Attorney for AT&T, where I represented AT&T before twelve major state utility commissions, handling some of the negotiations and both arbitrations of Interconnection Agreements between AT&T and SBC's Pacific Bell Telephone Company. During those years of experience, I have gained familiarity with the interconnection practices of all major incumbent local exchange carriers ("ILECs") in the U.S. and an intimate knowledge of the technical basis for disputes over various interconnection policies and practices.

PURPOSE

2. Resolution by the Federal Communications Commission (the "Commission") of the Petition for Declaratory Ruling sought by the Coalition of Competitive Fiber Providers

("Coalition") is necessary to ensure competition throughout the local telecommunications marketplace. Establishing the conditions necessary for the economic viability of competitive transport services will result in a broader choice of services and lower prices for consumers of those services. By contrast, tolerating anticompetitive disparities in operating conditions between ILECs and competitive carriers will harm all telecommunications customers and competitors, with attendant damage to national economic growth and efficiency.

3. This Declaration responds to the ILECs' unsupported allegations that competitive fiber providers have sufficient means for accessing the facilities of competitive local exchange carriers ("CLECs") that are located in ILEC central offices.

4. Several ILECs contend that there is no need to address the Coalition Petition because competitors can presently access their carrier-customers in a central office. These allegations are simply contrary to the realities of the ILECs' practices. Although Verizon asserts, without support, that competitive fiber providers "already have a way to meet their objective of bringing dark fiber and competitive transport services directly into the central office and distributing those facilities to collocating CLECs,"[1] the reality is that ILEC practices routinely prevent such access without expensive and unnecessary interconnection agreements, with the result that competitors cannot meet "their objective" ubiquitously across the nation.

5. Similarly, without providing any support, SBC also claims that "[o]nce a collocated CLEC requests competitive transport facilities, a competitive fiber provider can establish a direct connection with that CLEC in its central office space. . . . Thus, competitive fiber providers are not limited to connecting with CLECs outside of ILEC central offices, as the Coalition claims."[2]

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[1] VZ Comments at 3.

[2] SBC Comments at 12.

6. In actual practice, however, throughout the SBC region, as well as the BellSouth, Qwest and GTE legacy regions, this is simply not true. OnFiber has found that, with the exception of Verizon in the Bell Atlantic legacy region, the incumbents *do not* afford fiber providers stand-alone entry into their central offices necessary to provide efficient competitive transport services, outside the context of a formal Interconnection Agreement under Section 252 of the Telecommunications Act of 1996, 47 U.S.C. §252. Negotiation of such an Agreement, where the fiber provider does not seek the actual exchange of traffic with the ILEC in question, is extraordinarily expensive and time-consuming, and would significantly encumber the fiber providers' provision of service to CLECs for no rational economic reason. The standard terms and conditions the ILECs extract in any Interconnection Agreement are so onerous and costly that many fiber providers – and other carriers – have made the business decision neither to negotiate, seek or otherwise enter into them.

7. In part for these reasons, OnFiber currently does not interconnect with the incumbents' networks or seek collocation space in ILEC central offices. Instead, OnFiber's business plan is to provide service to CLECs and other carriers to help support their competitive networks. Without any interconnection agreement with the ILECs or collocation arrangements in the ILECs central offices, OnFiber finds it difficult or, in many cases, impossible to provide fiber-based connection with the facilities of its carrier-customers that are located inside ILEC central offices.[3]

8. Thus, by denying stand-alone access to their central office ducts, conduits and rights-of-way, ILECs are impeding every facet of competition in the local marketplace by forcing competitors to construct duplicative networks, increasing all competitors' dependence upon

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[3] *See also* OnFiber Comments at 6-10.

incumbents' networks, and discriminating against efficient competitive networks through the introduction of unnecessary costs and delays.

DECLARATION

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge and belief.

Executed on May 8, 2001

Glenn Stover

CERTIFICATE OF SERVICE

I, Leslie LaRose, hereby certify that on this the 8th day of May, 2001, I have served a copy of the foregoing document via *hand delivery and U.S. Mail, postage pre-paid, to the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Sections 251(b)(4) and 224(f)(1)	)	CC Docket No. 01-77
Of the Communications Act of 1934, as amended,	)	
To Central Office Facilities of	)	
Incumbent Local Exchange Carriers	)	

REPLY COMMENTS OF THE COALITION OF COMPETITIVE FIBER PROVIDERS AND THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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May 8, 2001

TABLE OF CONTENTS

SUMMARY

The Coalition of Competitive Fiber Providers and the Association for Local Telecommunications Services ("ALTS") submit these Reply Comments concerning the Coalition's Petition for Declaratory Ruling ("Petition").

Competitive Fiber Providers ("CFPs") are not currently afforded adequate access to ILEC central offices. Only Verizon in former Bell Atlantic and NYNEX territories permits CFPs to extend facilities into its central offices and place a distribution frame there that will permit the CFP to readily provide competitive transport services to CLECs. In most situations, CFPs must install separate fiber runs, or employ the ILEC to do so, each time a CLEC requests competitive transport services from the CFP. This substantially increases the costs of providing competitive transport services to CLECs, which may be SBC's and other ILECs' purpose in not offering CATT arrangements. This lack of adequate access thwarts CFPs' ability to offer increased service choices and lower prices to their customers.

Application of the ILEC central office Section 224(f)(1) does not negate or duplicate Section 251(c)(6), Section 251(c)(6) governs and imposes limits on CLECs' right to collocate equipment when they interconnect with the ILEC or access UNEs of the ILEC. In contrast, Section 224(f)(1) applies when a telecommunications carrier wants to access ILEC duct and conduit in order to provide telecommunications service without interconnecting with the ILEC or accessing UNEs. Thus, these Sections of the Act create complimentary rights of access to ILEC central office. The courts have found that Section 224(f)(1) authorizes a taking and that this taking is permissible as long as just compensation is provided. Therefore, the Commission may reject ILEC arguments that it may not apply Section 224 (f)(1) to the central office because this would constitute an unauthorized taking.

For the reasons explained in the Petition, ILEC central offices contain "ducts," "conduits," and "rights-of-way" within the meaning of Section 224(f)(1) and the Commission's rules. Section 224(f)(1) mandates "access" to any ILEC duct, conduit, or right-of-way. The Commission has not previously addressed the scope of "access" under that section. The Coalition and ALTS request that the Commission determine that "access" under Section 224(f)(1) includes, at a minimum, uses of ILEC duct, conduit, and rights-of-way that are already occurring in standard industry practice, or that otherwise are associated with reasonable use of those facilities.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of Sections 251(b)(4) and 224(f)(1)	)	
Of the Communications Act of 1934, as amended,	)	CC Docket No. 01-77
To Central Office Facilities of	)	
Incumbent Local Exchange Carriers	)	

REPLY COMMENTS OF THE COALITION OF COMPETITIVE FIBER PROVIDERS AND THE ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

American Fiber Systems, Inc., El Paso Networks, LLC.,[1] Fiber Technologies, LLC., Global Metro Networks, Telergy, Inc., and Telseon Carrier Services, Inc. ("the Coalition") and the Association for Local Telecommunications Services ("ALTS")[2] submit these Reply Comments concerning the Coalition's Petition for Declaratory Ruling ("Petition") initiating the above-captioned proceeding.[3]

I. THE PETITION WOULD RESOLVE A "CONTROVERSY"

Even while vigorously opposing the petition, BellSouth and Qwest make the claim that there is no controversy for the Commission to resolve, and, therefore, the petition should be

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[1] El Paso Networks, LLC. ("El Paso") provides competitive transport services in four Texas cities. El Paso plans to expand its network coverage to serve customers nationwide. El Paso is a wholly-owned subsidiary of El Paso Corporation, a diversified energy corporation and the largest natural gas pipeline company in the world.

[2] ALTS is a leading national industry association whose mission is to promote facilities-based local telecommunications competition. Created in 1987, ALTS is headquartered in Washington, DC and represents companies that build, own and operate competitive networks.

[3] *Pleading Cycle Established for Comments on Petition of Coalition of Competitive Fiber Providers for Declaration Ruling of Sections 251(b)(4) and 224(f)(1)*, Public Notice, CC Docket No. 01-77, DA 01-728, released March 22, 2001.

dismissed.[4] These carriers' opposition to the petition, and the confirmation in their pleadings that they do not permit CFPs the access to ILEC central office facilities that the Coalition requests, verifies that the Petition reflects a genuine controversy that the Commission may, and should, resolve in this proceeding. Contrary to Qwest's suggestion,[5] filing a complaint is not necessary for creation of a controversy within the meaning of Section 1.2 of the Commission's rules. Moreover, the Petition raises important issues that could help the Commission achieve the pro-competitive goals of the Act. As explained in the Petition, assuring that CFPs have adequate access to ILEC central offices will help CLECs provide service to more consumers at lower prices.[6] Accordingly, the Commission should continue to consider, and promptly grant, the Petition.

II. COMPETITIVE FIBER PROVIDERS DO NOT HAVE ADEQUATE ACCESS TO ILEC CENTRAL OFFICES

SBC contends that CFPs already have sufficient access to ILEC central offices. It contends that a CFP can connect with a CLEC in the CLEC's collocation space when the CLEC chooses the CFP as its transport provider.[7] Therefore, SBC suggests, there is no need for the Commission to address the Petition.

The Coalition and ALTS acknowledge that CLECs collocated pursuant to Section 251(c)(6) may also, pursuant to Section 224(f)(1), access ILEC duct, conduit, and rights-of-way leading to, and in, ILEC central offices and may employ a CFP to access those facilities on its

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4 BellSouth at 4; Qwest at 12.

5 Qwest at 12.

6 Petition at 7, 8.

7 SBC at 11, 12.

behalf and extend fiber to its collocation space.[8] However, the Coalition and ALTS request that the Commission determine that like all telecommunications carriers, CFPs, may also, pursuant to Section 224(f)(1), access ILEC duct, conduit, and rights-of-way leading to, and in, ILEC central offices independent of the separate right of CLECs collocated there to do so.

SBC ignores the more fundamental point, however, that CFPs are not afforded adequate access to ILEC central offices. Only Verizon in former Bell Atlantic and NYNEX territories permits CFPs to extend facilities into its central offices and install a distribution frame that will permit the CFP to readily provide competitive transport services to CLEC customers. Qwest suggests that Verizon's approach is an efficient means of allowing CFPs to serve multiple collocated CLECs in a central office.[9] Qwest states that if other ILECs followed Verizon's approach, the process of serving multiple collocators would be simplified for both CFPs and ILECs.[10] However, since other ILECs do not follow Verizon's approach, CFPs do not have that option. Instead, CFPs must install separate fiber runs, or employ the ILEC to do so, each time a CLEC requests competitive transport services from the CFP. This substantially increases the costs of providing competitive transport services to CLECs, which may be SBC's and other ILECs' purpose in not offering CATT arrangements. Accordingly, the Commission should reject SBC's suggestion that there is no need to grant the Petition because CFPs already have adequate access to ILEC central offices.

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[8] CLECs collocated pursuant to Section 251(c)(6) may also extend fiber to their collocation space, or employ CFPs for that purpose, as part of, and pursuant to, their collocation rights under Section 251(c)(6).

[9] Qwest at 12, 13.

[10] *Id.*

III. IN SECTION 224(f)(1), CONGRESS AUTHORIZED A TAKING OF ILEC PROPERTY

ILECs in this proceeding claim that permitting CFPs to access the ducts, conduits, and rights-of-way within an ILEC central office would "have the Commission exercise takings authority that it simply does not possess."[11] Verizon cites to *Bell Atlantic v. FCC* for the premise that the Commission has no authority to order a taking of ILEC property.[12] Verizon conveniently ignores that *Bell Atlantic* was decided in 1994, prior to enactment of the 1996 Act. The court in *Bell Atlantic* clearly did not consider the Commission's statutory authority under Sections 251(b)(4) and 224(f)(1) as those sections exist today. Moreover, in the *Gulf Power II* decision, the 11th Circuit specifically addressed Section 224, as amended by the 1996 Act, and found that it "authorized a taking of utilities property."[13]

The ILECs also conveniently ignore that "the Fifth Amendment does not proscribe the taking of property; it [merely] proscribes taking without just compensation."[14] Although the 11th Circuit found that the issue of the amount of compensation was not ripe in either *Gulf Power I* or *Gulf Power II*, the Court in *Gulf Power I* stated that "[a]llowing an administrative body, such as the FCC, a role in the process of determining just compensation for a taking is permissible so long as its order is subject to review . . . ."[15]

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[11] *See, e.g.*, Verizon at 6.

[12] *Bell Atlantic Telephone Companies v. Federal Communications Com'n*, 24 F.3d 1441 (D.C. Cir. 1994).

[13] *Gulf Power Co. v. Federal Communications Com'n*, 208 F.3d 1263, 1271, *en banc* (2000) ("*Gulf Power II*"), *cert. granted on other grounds*, 121 S. Ct. 879 (January 22, 2001); *see also Gulf Power Co. v. Federal Communications Com'n*, 187 F.3d 1324, 1329 (11th Cir. 1999) ("*Gulf Power I*").

[14] *Gulf Power I* at 1331 (citing *Williamson County Regional Planning Com'n v. Hamilton Bank*, 105 S. Ct. 3108, 3120 (1985).

[15] *Id.* at 1337.

Thus, the courts have found that Section 224(f)(1) authorizes a taking and that this taking is permissible as long as just compensation is provided. Since the ILEC would be compensated for the access it provides a CFP to its central office ducts, conduits, and rights-of-way, pursuant to Commission Section 224 pricing rules or on a case-by-case basis, the Commission may require the access requested by the Coalition without fear of allowing an unauthorized or uncompensated taking.

IV. SECTION 224(f)(1) APPLIES TO ILEC CENTRAL OFFICE FACILITIES

A. Section 224(f)(1) Applies to "Any" ILEC Duct, Conduit, or Right-of-Way

Section 224 (f)(1) provides that a utility "shall provide . . . any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[16] (emphasis added). In their opposition to the Petition, the ILECs simply ignore the plain language of the Act that mandates access to "any" of the ducts, conduits, and rights-of-way of the public utility. Thus, none of the ILEC commenters attempt to explain how the direct language of Section 224(f)(1) does not by its own terms apply to ILEC central office duct, conduit, and rights-of-way. As discussed in the Petition, the Commission concluded that this statutory access obligation is "without qualification" and "not limited by location . . . ."[17] Assuming there was a need to resort to legislative history to ascertain what Congress intended,

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[16] Section 251(b)(4) requires local exchange carriers to "afford access to the poles, ducts, conduits and rights of way of such carrier to competing providers of telecommunications services on rates, terms and conditions that are consistent with section 224." Section 271 requires Bell Operating Companies ("BOCs") to offer nondiscriminatory access to poles, ducts, conduit and rights-of-way owned by the BOC as part of the 14-point checklist with which BOCs must comply prior to obtaining authorization to provide interLATA service.

[17] *Promotion of Competitive Networks in Local Telecommunications, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 and Review of Sections 68.104, and 68.213 of the Commissions Rules*, WT Docket No. 99-217, CC Dkt Nos. 96-97 and 88-57; First Report and Order and FNPRM in WT Docket No. 99-217, Fifth Report and Order in CC Docket No. 96-98 and Fourth Report and Order in CC Docket No. 88-57, FCC 00-377 (Rel. Oct. 25, 2000), at para.76, 80. ("*Competitive Networks Order*").

nothing in the legislative history to this section suggests that Congress intended to limit application of Section 224(f)(1) to facilities outside of ILEC central offices. Commenters have not cited any legislative history to that effect. If Congress had intended to exclude application of Section 224(f)(1) to central office facilities it could have done so, but it did not. Therefore, Section 224 obligates the ILECs to provide nondiscriminatory access to "any" ILEC "duct, conduit, or right-of-way," including those leading to, and in, ILEC central offices.

The ILECs repeat endlessly that "[s]ection 224 does not encompass a general right of access to utility property."[18] However, the Coalition has not requested a "general right of access" to ILEC property or even to ILEC central offices. The Coalition has requested only that CFP's be afforded, pursuant to Section 224(f)(1), reasonable and non-discriminatory access to ILEC ducts, conduits, and rights-of-way leading to, and in, ILEC central offices.

B. Application Of Section 224(f)(1) To ILEC Central Offices Does Not Negate Section 251(c)(6)

Several commentors contend that the declarations requested in the Petition would negate Section 251(c)(6), and are, therefore, contrary to the Act.[19] They argue that Congress intended Section 251(c)(6) to exclusively govern access to ILEC central offices. Therefore, Section 224(f)(1) only applies to facilities outside of central offices, they contend.

The commentors' position fails to recognize that there is nothing inherently unreasonable or contradictory for Congress to have created two separate and different rights of telecommunications carriers to access ILEC central office facilities. As explained in the Petition,

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[18] Bell South at 12, 13.

[19] Verizon at 4, 5.

Section 251(c)(6) permits telecommunications carriers to collocate equipment necessary for interconnection or access to unbundled network elements.[20] Currently, the Commission, on remand from the D.C. Circuit, considering the precise scope of CLECs' rights under that section.[21] Section 224(f)(1) requires ILECs to provide "access" to ILEC duct and conduit. In its Petition, the Coalition requests that the Commission determine that CFPs may access and use ILEC duct and conduit in ILEC central offices for the purpose of interconnecting with CLECs collocated there without interconnecting with, or accessing the UNEs of, the ILEC. This determination would not negate or contradict Section 251(c)(6). Rather, Section 251(c)(6) governs and imposes limits on CLECs' right to collocate equipment when they interconnect with the ILEC or access UNEs of the ILEC. In contrast, Section 224(f)(1) applies when a telecommunications carrier wants to access ILEC duct and conduit in order to provide telecommunications service without interconnecting with the ILEC or accessing UNEs. Further, Section 224(f)(1) imposes limits on carrier rights under that section in that access is limited to ducts, conduits, and rights-of-way. Collocation under Section 251(c)(6) is not limited to ducts, conduits, or rights-of-way. In short, Sections 251(c)(6) and 224(f)(1) are complimentary provisions, establishing different rights, for different purposes, with different limitations. Therefore, the requested declarations would not negate Section 251(c)(6).

Moreover, commenters are incorrect in assuming that Section 251(c)(6) governs access only to ILEC central offices. Like Section 224(f)(1), Section 251(c)(6) applies to facilities both

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[20] Petition at 6.

[21] *Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket. Nos. 98-147, 96-98, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147 and Fifth Further NPRM in CC Docket No. 96-97, FCC 00-297 (Aug. 10, 2000)("*Collocation Remand Proceeding*").

inside and outside ILEC central offices. Thus, the Commission has determined that Section 251(c)(6) applies to any ILEC premises, such as remote pedestals, whenever a CLEC needs to interconnect with, or access UNEs of, the ILEC.[22] Therefore, commenters' interpretation of the overall structure of the Act to the effect that Section 251(c)(6) applies to the central office whereas Section 224(f)(1) applies outside the central office is clearly erroneous. Instead, both sections apply to facilities inside and outside the central offices subject to, as explained, different purposes and limitations. Therefore, the Commission should reject commenters' suggestion that the Coalition's requested declaration is inconsistent with the purpose and structure of the Act, or negates or duplicates Section 251(c)(6).

V. ILEC CENTRAL OFFICES CONTAIN DUCT, CONDUIT, AND RIGHTS-OF-WAY

A. Duct and Conduit

The ILECs in response to the Petition do not deny that they possess numerous facilities that are used, and intended to be used, for extending communications facilities into and around central offices. Instead, they choose to provide generalized allegations to the effect that their central office wiring systems are not "duct" and "conduit" under the definitions of those terms in the Commission's rules. However, as pointed out in the Petition, and by commenters, the Commission specifically expanded its definition of "conduit" from that of a pipe, to "structure."[23] "Structure" is broad enough to encompass virtually any wiring distribution system. Therefore, the Commission may, and should, determine that racks, clips, and the like,

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22 *Id.* at Para. 47.

23 Petition at 10; ASCENT at 7; CompTel at 4.

and virtually any wiring distribution system constitute "ducts" within the meaning of the Commission's rules for purposes of administration of Section 224(f)(1).

The Commission should reject ILEC arguments that a wiring distribution system must be fully "enclosed" for it to be considered a duct. In effect, ILECs are interpreting "enclosed" to mean "not exposed." However, there is no basis for this interpretation in the rules or any of the Commission's decisions. Moreover, wiring distribution systems that leave some aspect of the wiring exposed nonetheless "enclose" the wiring in the sense that racks, clips, straps and the like provide a protected pathway that hold the wiring in place and functionally separate the space holding the wiring from other space leading to, or in, the central office. There is no reason for the Commission to give to its definitions of "duct" and "conduit" the cramped readings the ILECs suggest. Instead, to the extent there is any ambiguity in the Commission's rules, the Commission should interpret them as requested by the Coalition because this would promote the pro-competitive goals of the Act .

There is also no requirement, contrary to ILECs' suggestion, that either a duct or conduit must be present for a right-of-way to exist. The Commission defines "pole attachments" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.[24] In the *Competitive Networks Order*, the Commission merely determined that rights-of-way, in the context of buildings, include "defined areas *such as* ducts or conduits".[25] The Commission did not mandate ducts or conduits to be present for a right-of-way to exist. Rather the Commission merely offered ducts and conduits as examples of the types of rights-of-way existing in buildings. Therefore, the

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[24] 47 CFR §1.1402; 47 CFR §224.

[25] *Competitive Networks Order* at Para. 76 (emphasis added).

Commission should reject ILECs' argument that rights-of-way do not exist in ILEC central offices because central offices do not contain "duct" or "conduit" under their cramped and erroneous interpretations of those terms.

ILECs have also failed to disclose the specific wiring distribution systems they employ in central offices or how, or why, these should not be considered "duct" or "conduit" within the meaning of the Commission's rules. Assuming that ILECs are correct that racks, clips, and straps do not constitute "duct" or "conduit" under the Commission's rules, which is not the case, it defies credulity to assume that ILEC central offices do not contain duct and conduit even under the ILECs' unduly cramped understanding of those terms. ILECs' silence on what wiring distribution systems they employ in central offices is essentially an admission that they possess central office duct and conduit subject to Section 224(f)(1) obligations. Accordingly, the Commission should reject ILECs' arguments on this issue.

B. Rights-of-Way

The ILECs assert that a right-of-way under Section 224 may not exist on an ILEC's own property. However, the Commission already has addressed, and rejected, this argument in the *Competitive Networks Order*.[26]

The ILECs also assert that a right-of-way may not exist in an ILEC central office because in the *Competitive Networks Order*, the Commission envisioned that rights-of-way only exist where there is "distribution plant."[27] Thus, the Commission concluded that "a right-of-way exists within the meaning of Section 224, at a minimum, where (1) a pathway is actually used or has been specifically designated for use by a utility as part of its transmission and distribution

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[26] *Id.* at Para. 83.

network and (2) the boundaries of that pathway are clearly defined, either by written specification or by an unambiguous demarcation."[28] However, as noted in the Petition, the Commission found that rights-of-way existed in connection with "distribution plant" "at a minimum."[29] Therefore, the Commission is not precluded from finding that rights-of-way exist in central offices, even assuming that wiring in central offices does not constitute "distribution plant." Accordingly, the Commission may, and should, determine, in response to the Petition, that rights-of-way within the meaning of Section 224(f)(1) exist in ILEC central offices wherever defined pathways are used to run wiring, as stated in the *Competitive Networks Order,*

In any case, the pathways running in, and to, an ILEC's central office constitute "distribution plant" because ILEC transmission facilities and wiring running from switches in central offices are the beginning of distribution plant carrying telecommunications signals throughout the ILEC network. Thus, even under the ILECs interpretation of the *Competitive Networks Order*, rights-of-way within the meaning of Section 224(f)(1) exist in ILEC central offices wherever defined pathways are used to run wiring.

VI. CLECS MAY USE SECTION 224(f)(1) TO CROSS-CONNECT

The ILECs rely on the DC Circuit's determination that the Commission had not adequately justified its previous rule that CLECs may cross-connect pursuant to Section 251(c)(6), for the proposition that cross-connects are not permissible under Section 224. However, as discussed, Sections 251(b)(4) and 224(f)(1) establish independent and different

27 Verizon at 9; Quest at 9.

28 *Id.* at Para. 82

29 *Id.*

rights to access ILEC central office facilities.[30] Therefore, the D.C. Circuit's decision concerning cross-connection pursuant to Section 251(c)(6) is irrelevant to whether CLECs may cross-connect pursuant to Section 224(f)(1). Simply stated, irrespective of Section 251(c)(6) rights, Sections 251(b)(4) and 224(f)(1) grant CLECs the right to access the ducts, conduits, or rights-of-way running to, and in, ILEC central offices. Therefore, a CLEC may utilize its right of access to those facilities under Section 224(f)(1) for the purpose of cross-connecting with other collocated CLECs.

VII. DARK FIBER MAY BE INSTALLED AS PART OF HOST ATTACHMENTS

Verizon contends that the Commission may not permit CFPs to install dark fiber in ILEC central office duct, conduit, and rights-of-way because dark fiber is neither a telecommunications or cable service and, therefore, triggers no obligations under Section 224.[31] In fact, as explained in the Petition, the Commission already has determined, and the courts have affirmed, that dark fiber may be installed as part of host attachments.[32] Accordingly, the Commission should reject commenters' arguments concerning dark fiber.

VIII. ILEC "CATT" OFFERINGS, WITH APPROPRIATE PRICING, COULD SUBSTANTIALLY AMELIORATE THE COALITION'S CONCERNS

As noted, Qwest suggests that Verizon's CATT approach is an efficient means of allowing CFPs to serve multiple collocated CLECs in a central office. Qwest states that if other ILECs followed Verizon's CATT approach, the process of serving multiple collocators would be

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30 Petition at 6.

31 Verizon at 8.

32 Petition at 15; *Pole Attachment Order*, 13 FCC Rcd 6777, 6811 (1998); *Gulf Power II* at 1279.

simplified for both CFPs and ILECs.[33] The Coalition and ALTS agree with Qwest. If other major ILECs, including Qwest, were to rapidly offer CATT arrangements, with appropriate pricing, this could significantly ameliorate the Coalition's concerns.

IX. THE COMMISSION MUST DETERMINE THE SCOPE OF "ACCESS"

As discussed, Section 224(f)(1) mandates "access" to any ILEC duct, conduit, or right-of-way. The Commission has not previously addressed the scope of "access" under that section. The Coalition and ALTS request that the Commission determine that "access" under Section 224(f)(1) includes the right to install and use equipment in central offices that telecommunications carriers already use and install in connection with "access" to duct, conduit, and rights-of-way outside of central offices. The Coalition and ALTS suggest that the Commission determine that reasonable and non-discriminatory "access" includes at a minimum the use of ILEC duct, conduit, and rights of in ways that already are occurring in standard industry practice, or that otherwise are associated with reasonable use of those facilities. As explained in the Petition, installation of connector blocks, power supplies, and distribution frames is already permitted as part of "access" to ILEC duct, conduit, and rights-of-way outside of ILEC central offices. Moreover, Verizon already is permitting this voluntarily, and another major ILEC – Qwest – argues in this proceeding that it would be reasonable for all ILECs to follow this approach. Therefore, the Commission should permit CFPs to install this equipment in ILEC central offices as part of their right to "access" ILEC central office duct, conduit, and rights-of-way.

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[33] Qwest at 12, 13.

Again, the Coalition and ALTS stress that, as determined by the 11th Circuit, Congress in enacting Section 224 (f)(1) authorized a taking of ILEC property. Moreover, the specific taking of ILEC property that the Coalition requests is reasonable for the reasons discussed above and because ILECs are entitled to compensation for this use of their duct, conduit, and rights of way pursuant to the Commission's pricing rules or on a case-by-case basis. Accordingly, the Commission should reject any ILEC arguments that the "access" to ILEC duct, conduit, and rights-of-way requested by the Coalition is unauthorized, uncompensated, or otherwise unreasonable.

X. SECTION 224(f)(1) APPLIES TO "MANHOLE ZERO"

No commenter disagreed with the Coalition's assertion that ILEC manholes nearest the central office constitute duct or conduit subject to Section 224(f)(1). Indeed, Qwest agrees that manhole zero is part of the ILEC's conduit system.[34] Accordingly, the Commission should determine, as requested, that ILECs must afford reasonable and nondiscriminatory access to manhole zero.

XI. THE COMMISSION SHOULD RELY ON BOTH SECTIONS 251(B)(4) AND SECTION 224(F)(1)

Florida Power & Light contends that the Commission should not grant the requested access to ILEC central office duct, conduit, and rights-of-way pursuant to Section 224(f)(1).[35] Instead, it contends that the Commission must mandate any such access pursuant to Section 251(b)(4).[36] Section 251(b)(4) specifically imposes on ILECs the duty to provide access to duct,

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34 Qwest at 14.

35 Florida Power & Light at 7-15.

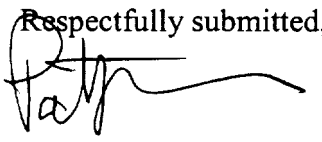
36 *Id.*

conduit, and rights-of-way consistent with Section 224. On other hand, Section 224(f)(1) applies to utilities which includes ILECs. Therefore, the Commission may, and should, mandate the requested access pursuant to both statutory provisions, as requested.

XII. CONCLUSION

For the reasons stated in the Petition and the Reply Comments, the Commission should promptly grant this petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply Comments of the Coalition of Competitive Fiber Providers and the Association For Local Telecommunications Services have been served, as indicated on the attached service list, by hand delivery or first-class mail, postage prepaid, on May 8, 2001.

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